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Forty-third session

Summary record of the 905th meeting
Held at Headquarters, New York, on Wednesday, 23 June 2010, at 10 a.m.

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) ..... (Switzerland)

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Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

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The meeting was called to order at 10.20 a.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules (*continued*)

Section III. Arbitral proceedings (*continued*)

Draft article 17. General provisions (*continued*)

1. **The Chairperson** invited the Committee to resume its consideration of draft article 17.

2. **Ms. Cordero Moss** (Norway) proposed that a comment should be included in the report to clarify that prejudice to any of the parties was not the sole criterion a tribunal should bear in mind when deciding whether to join a third party: it should also consider the impact of joinder on the enforceability of the arbitral award.

3. **Mr. Castello** (United States of America) said he concurred that the potential impact on enforceability should be taken into account. While the proposal by the representative of Norway described such impact as an additional consideration, however, his Government was of the view that it would be encompassed by the word "prejudice". Any comment that was added should not change the understanding that prejudice to a party included prejudice to the enforceability of the award.

4. **The Chairperson** said that he took it that the Committee agreed to the inclusion of a comment in the report as proposed by the representative of Norway.

5. **Mr. Anaya** (El Salvador) drew the Committee's attention to the proposal made by his Government, as contained in document A/CN.9/704/Add.1, to amend paragraph 2 in order to specify that no extension of the time limit for the issuance of the award would be permitted.

6. **The Chairperson** noted that the Rules contained a proviso stating that any provision that was contrary to the applicable law would not override that law. The Rules themselves did not provide for a time limit; such a limit would arise only under an agreement by the parties. If there was a prohibition against such a limit in the applicable law, that prohibition would prevail under article 1 of the Rules. He noted that no Committee member, apart from the representative of Mexico, had expressed support for the proposal by the Government of El Salvador.

7. **Mr. Holguín González** (Mexico) drew attention to his Government's proposal, contained in document A/CN.9/704/Add.6, that the rule set out in paragraph 4 should govern all communications relating to arbitration proceedings and should be set out in a new paragraph under article 2.

8. **The Chairperson**, noting that there was no support for the proposal just made, said that he took it that the Committee wished to adopt draft article 17 as amended thus far.

9. *It was so decided.*

Draft article 18. Place of arbitration

10. **Mr. Anaya** (El Salvador) drew the Committee's attention to his Government's proposal, set out in A/CN.9/704/Add.1, that the word "place" should be changed to "seat".

11. **The Chairperson** said that a lengthy discussion had taken place in the working group on that very subject. While many arbitration specialists preferred the word "seat" as the correct term, the working group had ultimately concluded that there should be no change and that the word "place" should stand. He saw no support in the room for the proposed change.

12. **Ms. Montejo** (Office of Legal Affairs) said that the phrase "deemed to" in article 18 might make it appear that the United Nations had voluntarily made itself subject to local law. The Organization was not subject to local laws, including in arbitration proceedings. The report should reflect that the reference to "the place of arbitration" in the revised text could not be interpreted as a waiver of the Organization's privileges and immunities.

13. *Draft article 18 was adopted.*

Draft article 19. Language

14. **Ms. Perales Viscasillas** (Spain) said that the plural "languages" had been amended to the singular in the UNCITRAL Model Law on International Commercial Arbitration and wondered whether the singular should also be used in the Rules.

15. **The Chairperson** explained that the plural had been removed from the model clause in order to avoid inciting parties to include several languages, as that could cause difficulties in proceedings. In some cases, however, it might be helpful to use more than one

language in an arbitration proceeding. In the provision under discussion, that decision was for the tribunal to make. Retaining "languages" in the plural would give the tribunal that option, whereas deleting the plural would preclude such an option.

16. *Draft article 19 was adopted.*

Draft article 20. Statement of claim

17. **Mr. Seweha** (Egypt) said that the purpose of the provision set out in paragraph 4 was to ensure that all documents were available so that decisions could be taken at the outset of the arbitration proceeding. That being the aim, a provision should be added stating that, if not all of the documents could be submitted, the statement of claim should be accompanied by a justification or explanation. It should also explain how such documents could be obtained or give the reasons why it was impossible to obtain them.

18. **The Chairperson** said that claimants did not need the Rules to know that they had to provide documentary evidence to back up their claims. If he did not hear any objections he took it that the Committee had rejected the proposal.

19. *It was so decided.*

20. **Mr. Anaya** (El Salvador) said that the word "recurso" used in the Spanish text for "relief" or "remedy" in article 20, paragraph 2 (d), should be replaced by "prestación" [measure], which would be the more accurate term to use.

21. **The Chairperson** said that that was a linguistic issue that should be resolved among the Spanish-speaking delegations.

22. **Ms. Perales Viscasillas** (Spain) said that the words "materia" or "objeto" should be used instead, as they were in the original text of the Rule.

23. **The Chairperson** suggested that as there was no problem with "relief" or "remedy" in English, the issue was purely one for the Spanish-speaking delegates to resolve.

24. *Draft article 20 was adopted.*

Draft article 21. Statement of defence

25. **Mr. Abdel Raouf** (Observer for the Cairo Regional Centre for International Commercial Arbitration) said that words "referred to" should be inserted between the words "arbitration" and "in" on the fourth line of draft article 21, paragraph 1, to make it easier for the cross reference to be understood.

26. **The Chairperson** said if he heard no objection he took it that the proposed addition was accepted.

27. *It was so decided.*

28. **Mr. Moollan** (Mauritius) said that in the absence of the representative of Slovenia, he wished to point out a suggestion from the Slovenian delegation contained in document A/CN.9/704, page 5, which read as follows: "It is suggested to consider whether draft article 21 (4) should also include a reference to draft article 20 (3), to cater for the situation where the counterclaim or claim for the purpose of a set-off would be based on a contract or legal instrument different from the one submitted by the claimant in the statement of claim."

29. **The Chairperson** said that if there was no objection, he took it that the words "paragraphs 2 and 4" on the first line of draft article 21, paragraph 4, would be replaced by "paragraphs 2 to 4".

30. *It was so decided.*

31. **Mr. Petrochilos** (Greece) said that as paragraph 4 set forth the requirements for a respondent asserting a counterclaim or claim for the purposes of set-off, it should include a cross-reference to draft article 4, paragraph 2 (f), which dealt with a stand-alone claim by the respondent against a party to the arbitration agreement other than the claimant. He suggested adding a comma and the words "a claim under article 4, paragraph 2 (f)" after the word "counterclaim" in draft article 21, paragraph 4.

32. **The Chairperson** recalled that one delegate had pointed out a similar situation where there was no requirement for the claimant to respond to a counterclaim. He wished to put that comment on the record because the Committee might return to it if a problem arose. He said if he heard no objection he took it that the suggested change had been approved.

33. *It was so decided.*

34. *Draft article 21, as amended, was adopted.*

Draft article 22. Amendments to the claim or defence

35. *Draft article 22 was adopted.*

Draft article 23. Pleas as to the jurisdiction of the arbitral tribunal

36. **Mr. Friedman** (Observer for the International Bar Association) said that the words "may rule" on the first line of draft article 23, paragraph 1, should be replaced by "shall have the power to rule". There were instances where the arbitral tribunal had a duty to rule on its own jurisdiction and as "may" was a permissive word, it might be interpreted as allowing the arbitral tribunal not to rule on its jurisdiction even though it had such authority and the law applicable to the arbitration mandated it to do so.

37. **The Chairperson** said that the delegation of El Salvador had made a similar suggestion in its written comments (A/CN.9/704/Add.1), which was to replace the word "may" by the words "has the power to" in describing the arbitral tribunal's functions. The words "shall have the power to" had been inserted to reflect the change made to the UNCITRAL Model Law on International Commercial Arbitration.

38. **Mr. Moollan** (Mauritius) said that even though the change had arisen from the change to the Model Law, States had the prerogative to use wording of their choice in its application. The Rules, on the other hand, were conferring a power and should use the language of the Model Law.

39. **The Chairperson** said that while there was a general policy to look to the Model Law for guidance, there was no requirement for the Rules to use identical wording.

40. **Mr. Jacquet** (France) said that he failed to see why there was a problem, as both the Rules and article 16, paragraph 1, of the Model Law — at least in the French version — used the word "*peut*" (may). In any event, if the tribunal was compelled to rule on its jurisdiction, it would have to do so even if that jurisdiction was not challenged, which would be unacceptable. His delegation would simply retain the language of the old Rules, which seemed to be consistent with practice.

41. **The Chairperson** said that there was a language problem once again, because the French text of the Rules said that "*le tribunal peut*" (the tribunal may), whereas the proposed English text said that "the tribunal shall have the power".

42. **Mr. Sorieul** (Secretary of the Commission) said that there was no translation problem, because both "shall have the power" and "may" could well be translated in French as "*peut*". Nonetheless, as he understood it, the proposal was not to revert to "shall have the power", but to use "shall rule", which would change the substance of the draft Rule.

43. **Mr. Friedman** (Observer for the International Bar Association) said that his proposal was not to use "shall rule", but "shall have the power to rule".

44. **Ms. Smyth** (Australia) said that, under draft article 23, paragraph 2, an objection as to jurisdiction in the context of a counterclaim must be raised no later than in the reply to the counterclaim. Yet there was no obligation in the Rules for claimants to respond to a counterclaim. Article 5, paragraph 6, of the International Chamber of Commerce (ICC) Rules of Arbitration, for example, required claimants to file a reply to any counterclaim. She wished to discuss the issue further with other delegations to see whether the UNCITRAL Arbitration Rules should include an express obligation to respond to a counterclaim.

45. **The Chairperson** said that members should feel free to point out anything that required changing, even if it was in draft articles that had already been adopted.

46. **Mr. Petrochilos** (Greece) said that the only reference to a reply to a counterclaim was in article 21, paragraph 3, of the old Rules, which had been envisaged as a substantive pleading, unlike the paragraph in the ICC Rules. Nonetheless, the issue was covered by draft article 24, which allowed the tribunal to decide which further statements, in addition to the statement of claim and the statement of defence, were required from the parties.

47. **The Chairperson** said that the Committee should consider that the issue of a reply to a counterclaim was covered by draft article 24 and that if at a later stage it was determined that there was a need for an addition, a proposal could be made to that effect.

48. *Draft article 23, as amended, was adopted.*

Draft article 24. Further written statements

49. *Draft article 24 was adopted.*

Draft article 25. Periods of time

50. **Mr. Seweha** (Egypt) said that draft article 25 established the general principle that written statements should be submitted within 45 days, but then added the

exception that the tribunal might extend that time limit if it concluded that the extension was justified. His delegation felt that if the general principle called for a 45-day time limit, the exception could not be without a time limit. He proposed adding the words "for a further period of" or "for a period not exceeding a certain number of days", or perhaps simply saying that the original statement and the exception should be submitted within 45 days.

51. **The Chairperson** said that a time limit had not been envisaged for the exception because arbitration cases were all different and a time limit was not always appropriate in the case of an exception.

52. **Mr. Seweha** (Egypt) said that 45 days should not necessarily be the requirement, but that since the original statement had a 45-day time limit, the exception could not be open-ended.

53. **The Chairperson** said that if he heard no support for the establishment of a time limit for the exception, he took it that the draft article would be left unchanged.

54. *It was so decided.*

55. *Draft article 25 was adopted.*

Draft article 26. Interim measures

56. **Mr. Torterola** (Argentina) proposed that draft article 26, paragraph 2 (c), should be deleted; if it was retained, wording should be added stating explicitly either that the provision did not apply to the assets of States, or that it applied taking into account rules on immunity of States, or that it did not waive such rules.

57. **Mr. Petrochilos** (Greece) proposed that the last part of the chapeau of paragraph 2 should be reworded along the following lines: "the arbitral tribunal orders a party to take, without limitation, any of the following measures".

58. Paragraph 9 as currently drafted was extremely difficult to understand, particularly for readers who were not aware of the discussions that had led up to it. The intent behind it was to avoid offending against domestic law, which might have specific provisions allocating jurisdiction on preliminary orders, *ex parte* measures and so on to domestic courts. The paragraph could be deleted, especially since draft article 1, paragraph 2, safeguarded the primacy of the law of arbitration.

59. **Ms. Montejo** (Office of Legal Affairs) proposed that a note should be added to the Commission's report reflecting the ability of the tribunal to dictate that the types of measures referred to were contrary to the privileges and immunities of the United Nations pursuant to article II, section 3, of the Convention on the Privileges and Immunities of the United Nations.

60. **The Chairperson** suggested that, since the representative of the Office of Legal Affairs had raised a point similar to that raised by the representative of Argentina, the two representatives should consult on a possible solution.

The meeting was suspended at 11.35 a.m. and resumed at 12.10 p.m.

61. **Mr. Moollan** (Mauritius) said that many Governments and organizations — future users of the Rules — had commented that draft article 26, paragraph 9, was incomprehensible: The text had been drafted during a heated debate in the Working Group, in which delegations had disagreed as to whether paragraph 1 of draft article 17 (article 15 of the 1976 Rules) created the power to order preliminary measures *ex parte*. Those who had taken the view that the power already existed under that rule had wanted to ensure that the power was not taken away, while those who had believed that no such power existed had opposed creating it. The text was an attempt to explain why the Rules did not deal with preliminary orders and had been intended for inclusion in the explanatory notes rather than in the Rules themselves. He proposed that it should be moved back to the explanatory notes.

62. **Ms. Smyth** (Australia) expressed agreement with that proposal.

63. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that his delegation also supported the proposal, but that changes would still be needed in order to ensure that the text made sense. For example, if an interim measure had merely been "requested", then the party towards which the measure was directed would not know about it; it would therefore be difficult for that party not to frustrate the purpose of the measure.

64. **Mr. Castello** (United States of America), supported by **Ms. Perales Viscasillas** (Spain) and **Mr. Chung** Chang-ho (Republic of Korea), said it was his delegation's recollection that paragraph 9 had been intended for inclusion in the Rules rather than in the

notes. The paragraph had been debated at length and represented an important point which should not be discarded, namely that there was nothing in the Rules that authorized the institution of preliminary orders, but at the same time there was nothing that precluded a tribunal from issuing a preliminary order if it was otherwise authorized to do so.

65. Although the language was somewhat ungainly, it represented a carefully considered attempt to accommodate a strong division of opinion; those who criticized it should propose better language. Moreover, criticisms of the wording of a given provision should not be used to deflect attention from that provision's merits. Lastly, it should be borne in mind that draft article 26, paragraph 9, was substantively linked to draft article 17, paragraph 4; the deletion of the former would therefore have the effect of disassembling a carefully crafted position.

66. **Mr. Ghikas** (Canada) said it was also his delegation's understanding that paragraph 9 had been intended for inclusion in the Rules themselves rather than in the notes. However, he agreed with the proposal to delete it, since it neither added to nor subtracted from the Rules.

67. **Ms. Aguirre** (Argentina), expressing support for the remarks made by the United States representative, said that the paragraph should be retained as it stood.

68. **Mr. Möller** (Observer for Finland) said that, while the wording could be improved, the paragraph should not be deleted; moreover, it should be placed in the Rules rather than in the notes. The inclusion of provisions on preliminary orders in the UNCITRAL Model Law on International Commercial Arbitration had also been highly controversial, and yet a compromise had been reached. Since the compromise on paragraph 9 had been preceded by an extensive debate, he hoped that the debate would not now be reopened.

69. **The Chairperson** pointed out that the debate was not being "reopened"; the Commission or its Committee of the Whole was free to disagree with the conclusions of the Working Group. The problem with paragraph 9 was precisely that it did not contain the compromise found in the Model Law, where preliminary orders had been the compromise solution. That solution had not been accepted by the Working Group in respect of paragraph 9; the latter was in fact a rule that said nothing. As pointed out by the representative of Mauritius, the concern was that some delegations had taken the view that an arbitrator sitting under the Rules had the power to order preliminary measures, while others had held that the Rules did not give the arbitrator that power. Paragraph 9, in stating that the Rules did not give the arbitrator that power, excluded the compromise solution in the Model Law.

70. **Mr. Möller** (Observer for Finland) agreed that paragraph 9 represented a different type of compromise from that found in the Model Law, but it was a compromise nonetheless. Although the Rules did not create the power to order preliminary measures, they did not limit it either, and it should still be pointed out that agreeing to the Rules did not preclude a party from applying for a preliminary order if it was entitled to do so under the law applicable to the arbitration. The provision should therefore be retained.

71. **Mr. Jacquet** (France) said that a practical point regarding the usefulness of the text was that arbitral tribunals always had difficulties with requests for ordinary interim measures; applications for preliminary orders put them in an even more difficult position. He agreed with the proposal to move paragraph 9 to the notes.

72. **Mr. Lebedev** (Russian Federation) said that, in order to understand paragraph 9, future users of the Rules might refer to the documents regarding the discussions in the Working Group that were mentioned in the footnote to draft article 26. He requested the secretariat to outline the discussions contained in those documents so as to shed more light on the intent behind the paragraph.

73. **The Chairperson** said that his understanding was that the footnotes would not be published with the official Rules and were just for the purposes of the Committee's discussion.

74. **Mr. Sorieul** (Secretary of the Commission) said that the unprecedented five full pages of notes on draft article 26, paragraph 9, combined with the comments of the delegations, had covered the issue fully, and there was no need to reopen the discussion.

75. **Mr. Moollan** (Mauritius) said that his intention had not been to reopen the discussion. But the problem remained that draft article 26, paragraph 9, had been drafted as a footnote but had somehow ended up as part of the text. Unlike the Model Law, from which countries could pick and choose provisions to include

in their national legislation, the Rules would have to be adopted in their entirety. Draft article 26, paragraph 9, was a "non-rule" and should be deleted.

76. **The Chairperson** said that it would be a bad precedent to have a rule that could only be understood with reference to footnotes. In the absence of any proposals for redrafting the Rule in a more comprehensible fashion, he would take it that the Committee agreed that draft article 26, paragraph 9, should be deleted.

77. **Mr. Castello** (United States of America) said that deleting draft article 26, paragraph 9, would raise the question of what would happen to the reference to that paragraph contained in article 17, paragraph 4.

78. **The Chairperson** said that if article 26, paragraph 9, was deleted, then naturally the reference to it in article 17, paragraph 4, would also have to be deleted.

79. **Mr. Castello** (United States of America) said that the reference to article 26, paragraph 9, contained in article 17, paragraph 4, could not simply be deleted, but would have to be replaced with something else, because it addressed the substantive question of when exceptions would be allowed to the rule that communications to the arbitral tribunal should be communicated simultaneously to all parties.

80. **The Chairperson** agreed that if article 26, paragraph 9, was deleted, then the Committee would have to consider whether or not the exception provided for in article 17, paragraph 4, should be preserved in some other formulation. He asked if any consensus had been reached on the wording of draft article 26, paragraph 2 (c).

81. **Mr. Torterola** (Argentina) suggested that the following sentence, using language taken from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, should be added: "Nothing regarding or relating to article 26, paragraph 2 (c), should be construed as derogating from the law on immunity from execution".

82. **Mr. Petrochilos** (Greece) said that adding language to one particular provision stating explicitly that it did not imply a waiver of immunity suggested that all other provisions not containing such language did imply such a waiver. He noted that there had never been any concern before that authorizing the arbitral tribunal to grant interim measures implied a waiver of immunity.

83. **Mr. Jacquet** (France) said that it was inadvisable to add language to either the text or the notes. First of all, the Working Group had deferred all questions touching on arbitration involving a State to a later stage. Secondly, from the point of view of States, the issue was moot. States always had the option of forgoing arbitration under the UNCITRAL Rules in favour of arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which took into account the special concerns of States, including immunity. It had become generally understood that agreement by a State to arbitration did not imply automatic waiver of immunity, and States no longer appealed to immunity as a pretext for refusing arbitration. Immunity might come into play where a tribunal ordered interim measures against State assets, but that was an issue to be handled by the relevant national enforcement agencies and did not need to be addressed in the Rules.

84. **Mr. Loken** (United States of America) said that the phrase "derogating from the law on immunity from execution" sounded like it was referring to a particular law, but there was no single accepted general rule involved. He suggested that the concerns expressed by Argentina were already adequately addressed by the general principle expressed in article 1.

85. **The Chairperson** said that he understood the reference to "the law" to indicate whatever law was applicable, and that therefore concerns about waiver of immunity were covered by the general provision in article 1. In addition, a note to the effect that the Rules had no effect on immunity would be included in the report.

86. **Mr. Torterola** (Argentina) said that it was not the case that the language of the Rules had no impact on immunity of jurisdiction of States. There had been a case in which language in existing article 32 describing Tribunal awards as "final and binding" had been cited by French courts as implying a waiver of immunity. If the issue was deferred, then the Rules as they stood would be in force in the interim, which could be years. Until the issue was resolved by a general rule, the language he proposed should be included in article 26. As the Chairperson had noted, the phrase "the law" was intended to refer to the law in force where the interim measure was being executed.

87. **Mr. Sorieul** (Secretary of the Commission) said that he wished to clarify that there were in fact no plans for the Working Group to address arbitration involving States. The delegates had deliberately restricted the Working Group's mandate to discussing transparency in investment disputes based on treaties. If the Commission wanted to broaden the Working Group's mandate it was free to do so.

88. **The Chairperson** said that the issue immediately at hand was whether the wording of article 26, paragraph 2 (c), could be construed as implying a waiver of immunity, and if so, whether some clarification should be inserted into the text of the Rules themselves.

The meeting rose at 1.05 p.m.